No. 304

IN THE

Supreme Court of the United States

October Term, 1953

ELMER F. REMMER, *Petitioner,*

v.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S MEMORANDUM SUPPLEMENTING ORAL ARGUMENT

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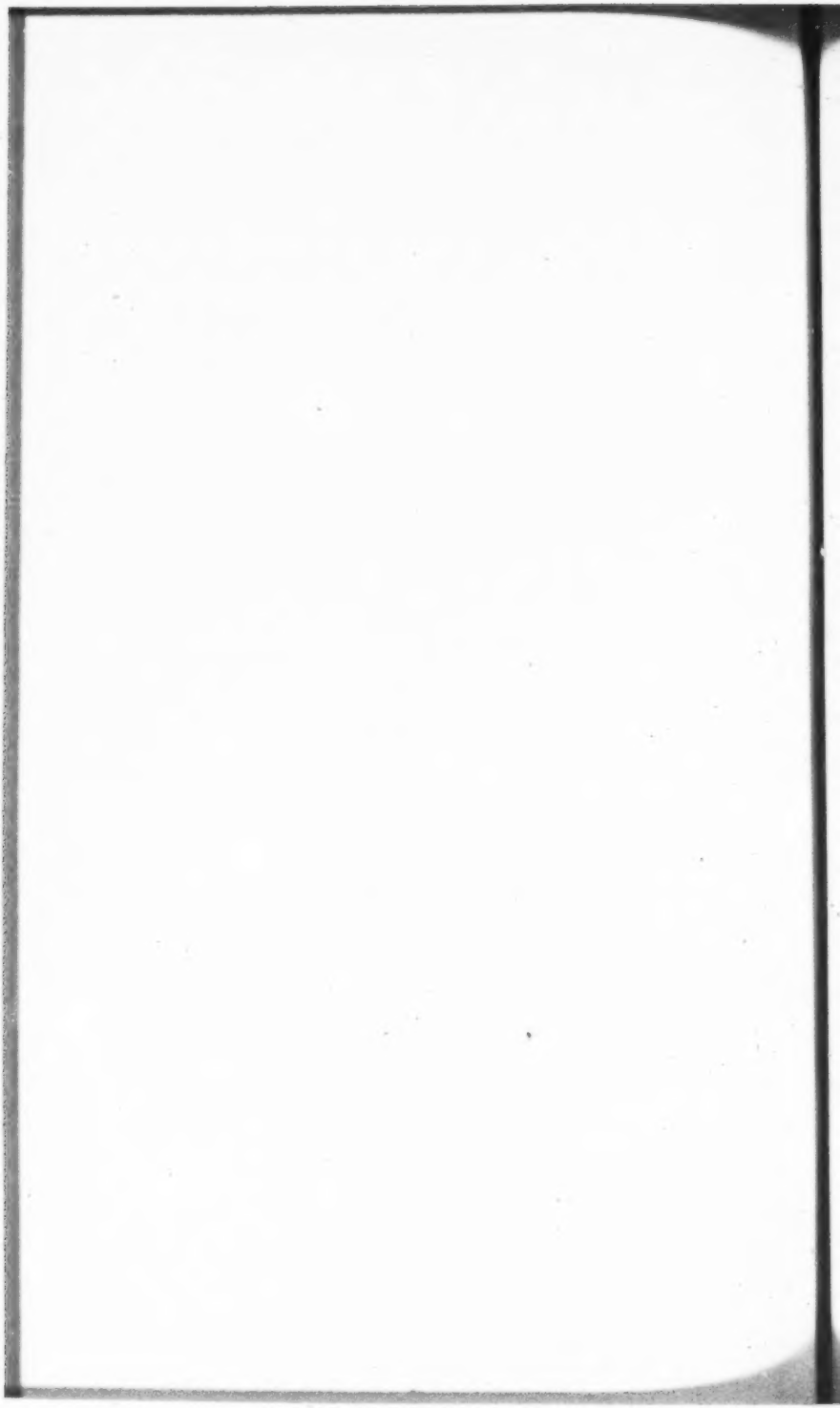

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To the Honorable, the Chief Justice and the Associated Justices of the Supreme Court of the United States:

At the argument of this case on February 2, 1954, the Court granted Petitioner's request that consideration be given to a short memorandum supplementing the argument. This memorandum is filed in response to that permission.

1. The parties agree that the fraud issue is wholly dependent on the non-recognition of the partnerships. That issue is not simply a question of whether the jury believed the evidence. It involves a consideration of whether the issue should have been presented to the jury at all and in addition whether the instructions (including the business purpose test) permitted or invited the jury to go behind the evidence.

The statutory definition recognizes practically any joint venture as a partnership. The approval of a concept of tax evasion which would include the mere claim that a partnership has been created would open the door to punishment for bona fide claims in the many debatable areas of tax law.

The affirmance of this case will clothe jurors with the authority to go behind the evidence and make verdicts depend upon the nebulous tests applied by administrative tribunals under the authority of *United States* v. *Cumberland Public Service Co.*, 338 U. S. 451, fn. 3.

In the absence of evidence which contradicted the partnership form, there was no issue for the jury. (*Chisholm* v. *Commisisoner*, 79 F. 2d 14 (CA 2)).

2. The Government agrees that its net-worth computations are meaningless unless the starting point is solidly fixed. It concedes that it was unable to prove the amount of starting point cash and that it therefore gave Petitioner credit for none. Its attempt to establish sufficient evidence to go to the jury is based on two erroneous premises: (1) that it need simply show that one particular sum of $17,000 placed in the safe deposit box in December, 1943 could have been spent by the end of that month; and (2) that the starting point cash necessary to overcome the 1944 deficiency would have to be at least $31,000.

First, we note that the evidence with respect to the $17,000 (R. 1483-4) was not an effort by the prosecution's witness to show the total amount of cash on hand. At another point (R. 1536), he had testified that the amount varied from time to time. His testimony in R. 1484, is merely a statement that a particular check in the amount of $17,000 was cashed and the proceeds placed in the safe deposit box on December 3, 1943. This check did not represent the proceeds of the operations of the enterprises; it represented a payment for liquor which Petitioner had purchased for another business friend. Accordingly, this

evidence does not purport to indicate the amount of cash which went into the safe deposit box from the ordinary operations of the various enterprises.

Moreover, the Government's conclusion that the $17,000 deposited on December 3, 1943 was used up by December 31, 1943 in the purchase of cashier's checks is not supported by the facts and the jury would not have been warranted in reaching such a conclusion. The cashier's checks upon which the Government relies were purchased to pay losses of the B-R Smoke Shoppe on bets received from other cities. (R. 1417-21). They involved only part of the daily operations, and resort to the safe deposit cash would have been necessary only if the total operations showed a loss. Ex. 116 (R. 1417, 1422, not printed) shows that during December, 1943, twenty-three checks, totaling $20,866.67 in value, were purchased on twelve different days. The B-R diary for 1943, (Ex. 111-A, R. 1350, 1354, not printed) shows a net profit for December of $186 on all bets placed. The largest net loss on any day was $350 and at no time during the month did the cumulative operations show a loss. Accordingly, it is clear that the wins were sufficient to pay for all cashier's checks and there is no evidentiary basis upon which the jury could have properly inferred that the checks were purchased with the $17,000 placed in the box on December 3, 1943.

Secondly, the Government argues that $31,000 in cash at the starting point would be necessary to overcome its deficiency computation for 1944, and, thus, that there is a deficiency even if Petitioner is given credit for $17,000 cash on hand at the starting point. That argument, however, overlooks the fact that a substantial part of the deficiency is based on obviously technical accounting adjustments as to which fraud could not properly be inferred. For example, the Government was permitted in Ex. 183 (R. 3612) to add to Petitioner's 1944 closing net worth the sum of $8,397.53 paid as liquor excise tax in 1944, even though the

law gives him the option (as the jury was instructed, R. 145) to treat this as a current deduction rather than an addition to the cost of the liquor.

Allowance for this adjustment and recognition of the partnerships would substantially eliminate the 1944 deficiency even if there were no starting-point cash.

3. The jury could not properly have adopted the Government's treatment of the $15,000 in "markers" of the B-R Smoke Shoppe as the equivalent of cash. It could not ignore the nature of this particular type of "markers". The evidence clearly shows that they represented unpaid bets of patrons. (R. 1360-61, 1949, 1962). It is true that in the card-room operations (Menlo Club and 186 Club), the business at times loaned money to patrons who played in the establishments; and it was *specifically* to the Menlo Club (*not* the B-R) markers that Special Agent Weaver's testimony, quoted in the Government's Brief (pp. 88-90), relates. (R. 2722-4).

The B-R markers, however, represented unpaid bets on horse races (R. 1360-61) and were not in any sense loans of money previously taken in. Neither is there any evidence to support the speculation that the B-R markers may have represented cash advanced for bets at the race track, or on lay-off bets. Nor was there any instruction to the jury permitting such an inference to be drawn.

The jury did not have the benefit of the present concession that these markers should not have been treated as income if they represented unpaid bets. (R. 2776).

The bald way in which this $15,000 in "markers" was labeled as "cash" in Ex. 169 (R. 3601) and then reflected in Ex. 183 (R. 3612) could easily have misled the jury. The elimination of that sum from the 1945 computation not only wipes out any deficiency for that year, but it also raises the question of whether the jury would have convicted at all if the total amount involved in the case had been reduced by so large a sum.

4. At the argument, inquiry was made by Mr. Justice Reed as to the showing made in *United States* v. *Johnson*, 319 U.S. 503, with respect to the starting point cash. An examination of the record in that case discloses that the defendant himself furnished the figures which the Government accepted and used in its calculations.[1] Here the defendant gave no evidence, and it is quite unlikely that he had a personal recollection of his cash position eight years before the trial.

It is noteworthy that the expenditures method employed by the prosecution in the *Johnson* case was corroborative of other evidence which showed that Johnson had a source of income which was not disclosed by his tax returns. While the case involved partnerships, Johnson disclaimed all connection with them. The prosecution proved that he received at least some of the income from the partnerships, and the expenditures method was employed to confirm that additional source of income. There is no evidence in this case of unreported sources of income, nor is it contended that the partnership returns failed to report the correct income of each enterprise.

5. Following denial of Petitioner's Motion for Inspection under Rule 16, and the quashing of the subpoena for production of his records by the prosecution under Rule 17, Petitioner made further effort to obtain his records. His Motion, during the trial, for production and inspection of these same records was summarily denied. (R. 928-9). This is in sharp contrast to the granting at the same time of a motion by the prosecution for an order directing Petitioner to deposit in court, for the prosecutor's examination and use, that portion of Petitioner's records previously returned to him.

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[1] See *U.S.* v. *Johnson*, No. 4, 1942 Term, V. 2 of Record, p. 10, and Addendum following p. 110 of Brief for United States on Reargument. Johnson had told the Revenue Agent he had $10,000 on his person, and $58,000 in his safe at the starting point, and the government gave him credit in full for both sums.

6. We submit that no reasonable jury could conclude that the circumstantial evidence in this case removed the hypothesis of innocence. The concession that cash in some unknown amount existed on December 31, 1943 rendered it impossible for a rational conclusion to be reached that the increase in Petitioner's assets during 1944 was financed by unreported income of 1944. The question mark in the Government's net-worth exhibit does not take the place of evidence. Accordingly, it is not important here to settle the question whether the trial court's personal opinion of the hypothesis of innocence is sufficient to withhold the case from the jury.

7. The Court invited comment of counsel on whether a consideration of the other issues is necessary for the purpose of a hearing on the effect of the extraneous jury contact. If such a hearing should result in the denial of a new trial, final disposition of the case would require a resubmission to this Court of the other issues in the case.

If, on the other hand, a new trial should be granted because of the jury contact, that trial would certainly raise again the questions of general importance which this Court now has the opportunity to settle.

Respectfully submitted,

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February, 1954.

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